SINGAPORE REPORTS.

JALBAUD v. JALBAUD.

[Orig. Civil Jurisdiction (Murray-Aynsley, C.J.)
January 31, 1947]

Private International Law—Separation deed containing covenant for monthly payments to wife—Whether Deed abrogated when wife is in enemy-occupied territory—Point not pleaded—Election of husband to treat it as valid.

In this case the wife claimed arrears of monthly payments from 5th October 1946 until the date of the writ, due under a separation deed. The deed was executed in 1941 and contained a covenant by the husband to pay $425/- on or before the 5th day of every month. The husband claimed that he was entitled to set-off a sum of $1,800/-, which had been caused to be credited by the husband to his wife with the Bank of New South Wales in Sydney. It was contemplated by the parties that the wife with her children should go to Australia. Early in February 1942 the husband escaped from Singapore to India where he remained till 1945 but the wife and children were still in Sourabaya, Java, when that place was captured by the Japanese and they remained there uninterned until repatriated to Singapore in November 1945. The sum of $1,800/- was transferred from Sydney to Singapore by the husband. The husband claimed that his act in inducing the bank to transfer the credit to his wife's account in Singapore amounted to a fresh payment.

Held, (1) that as the husband had not pleaded the point that the deed was abrogated when the Japanese occupied Sourabaya, he must be deemed to have elected to treat it as valid, and the result of this is that the payments made before the fall of Sourabaya must be considered as referable to the period immediately following payment;

(2) that, as hostilities are now over and as the wife was never at any time an enemy except as a consequence of her involuntary residence in Java, the question of public policy is not so pressing that the Court should declare the deed abrogated when the husband decides to treat it as valid.

Case referred to :—

(1) *Sovfracht v. Van Udens Scheepvaart Argentuur Maatschappij* (1943) 1 A.E.R. 76.

Murray-Aynsley, C.J. :—In this case a wife claims arrears of monthly payments due under a separation deed.

This deed, which was executed in 1941, contained a covenant by the husband to pay $425 on or before the 5th day of every month. The wife was to maintain herself and the children of the marriage.

The subsequent history is as follows. The monthly payments appear to have been made regularly up to the month of December, 1941. Towards the end of that month the wife left Singapore for Java. Before she left the husband seems to have made the payment due of the 5th of January. She also took some $600 of her own money and it was arranged that the funds of both parties should be paid into a joint account so that, if need be, she might draw on it. In the month of January the husband seems to have sent to his wife in Java about $800 and in the month of February caused the equivalent of $1,800 to be credited to his wife with the Bank of New South Wales in Sydney.

It seems to have been contemplated by the parties that the wife with the children should proceed to Australia, but I am unable to find that there was any contract to this effect. It appears to me that the effect of the transaction was to make the wife the owner of that sum and it does not appear to me that the husband could have withdrawn the credit without the consent of the wife. Early in February the husband escaped from Singapore to India where he remained until last year.

The wife was less fortunate. She obtained a visa for Australia but owing, as she says, to the illness of one of the children was still in Sourabaya when that place was captured by the Japanese and remained there uninterned until repatriated to Singapore in November of 1945. This causes me difficulty. By the authority of the *Sovfracht* case[1] it is clear that if the husband had chosen to take that point the deed would have been abrogated and no further cause of action could have arisen under it. Apart from that it is clear that any payment to the wife would not only be impossible but illegal as long as the wife remained in enemy occupied territory. From January of this year the husband has made certain payments less than the stipulated amounts. He also arranged with the Bank to transfer the credit of $1,800 from Sydney to Singapore. No doubt the Bank acted very reasonably under the circumstances but I do not see how the husband had any control over this sum at that date. The husband also at the request of the wife supplied certain articles of furniture and clothing.

The wife now claims the balance due under the deed from the 5th October until the date of the writ but gives credit for $556.92 the value of the furniture etc. supplied.

The husband claims that he is entitled to set off the sum of $1,800 previously referred to and also the sum of $600 the estimated value of the clothes supplied.

The way the claim about the $1,800 is put by the husband is that the original credit of $1,800 was created in pursuance of a contract between the parties that the wife should go to Australia and the wife did not go there. There is, therefore, either a breach of contract or a frustration. The action of the husband in inducing the Bank to transfer the credit to the wife's account in Singapore amounted therefore to a fresh payment. I am unable to see it in that light. I cannot find that there was a contract. On the other hand, I do not think that it would be reasonable to treat the payment as a mere gift. If the wife had escaped to Australia I think that the husband would have been entitled to set off this sum against further payments which might have become due. I now find that a position of great difficulty arises. At the moment when the wife became a resident in enemy occupied territory the husband had paid more than he was obliged to pay by his covenant. Is the husband entitled to credit this sum against payments due for the period after the wife ceased to live in enemy occupied territory? If it had merely been a question of the local moratorium I do not think that there would have been any difficulty. The payment would have been for the period covered by the moratorium and not for the later period.

The other question arising out of the enemy occupation is more difficult. As I have said, it seems settled that the deed was abrogated when the Japanese occupied Sourabaya. The husband, greatly to his credit, has not chosen to plead this point. I have considered whether, in spite of the fact that it is not pleaded, I should not have decided the case on this ground. However, since hostilities are now over and the wife was never at any time an enemy except as a consequence of her involuntary residence in Java, I think that the question of public policy is not so pressing that I should declare the deed abrogated when the husband decides to treat it as valid. I consider that the consequence of his electing to treat it as valid is that the payments made before the fall of Sourabaya must be considered as referable to the period immediately following payment.

As regards the clothing, it is clear that the husband did something that was beyond the scope of the agreement. It also appears that this was done at the request of the wife. I think that the action of the husband must be construed with reference to his obligations under the covenant and that he is entitled to set off his expenditure against what is due under the covenant. To ascertain this, unless the parties can agree, there must be an enquiry by the Registrar. A point was taken, although not pleaded, about the date of the moratorium. This appears to me the date from a day in August 1945 and so does not affect the amount claimed. There must be judgment for the wife for the amount claimed less what the Registrar finds expended on clothing, with costs.

Order Accordingly.

LAU TECK SOON vs. REX.

[App. Crim. Juris. (Brown, J.) January 24, 1947]

Price Control Proclamation, Section 4A (1) (iii)—Prohibition of Export (Textiles) (No. 2) Order, 1946—Power to make rules to prohibit export of textiles—Order made is ultra vires the Section.

In this case the accused was convicted of contravening Section 3 of the Prohibition of Export (Textiles) No. 2 Order 1946 (Gazette Notification No. S. 114 of 1946) which provided that "The export of any length of any controlled textile in excess of ten yards is hereby prohibited except with the written permission of an Assistant Price Controller." This Order purported to be made by the Deputy Price Controller in exercise of the powers conferred upon him by Section 4A (1) (iii) of the Price Control Proclamation which gives power to a Deputy Price Controller to "prohibit or control the export of any controlled article to any specified area."

Held, that the Prohibition of Export (Textiles) (No. 2) Order, 1946 is **ultra vires** Section 4A (1) (iii) of the Price Control Proclamation as no areas were specified and it was in effect a general prohibition of exports.

MAGISTRATE'S APPEAL.

MARK MORRISON for the appellant.

A. W. BELLAMY for the respondent.

Brown, J. in an oral judgment said:—This was originally an appeal against sentence only from a conviction by the learned Magistrate upon a plea of guilty. But Mr. Morrison applied for extension of time within which to appeal against the conviction, which I granted.

The appellant was convicted of contravening section 3 of the Prohibition of Export (Textiles) (No. 2) Order, 1946. That Order purports to be made by the Deputy Price Controller in the exercise of the powers conferred upon him by section 4A (1) (iii) of the Price Control Proclamation, which gives power to a Deputy Price Controller to:—

> (iii) prohibit or control the export of any controlled article to any specified area: